IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

Crl.Rev.Pet.No. 734 of 2007()

CRMP.588/2006 of ENQUIRY COMMR. & SPL. JUDGE, TRIVANDRUM

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REVN. PETITIONER: REVISION PETITIONER/COMPLAINANT

MADATHIL MARAKAR HAJI,S/O.KUNJU MOIDEEN,
MADATHIL HOUSE,VALLUMBRAM DESOM,POKOTTOOR VILLAGE,
ERNAD TALUK,MALAPPURAM DISTRICT.

BY ADV. SRI.P.VIJAYA BHANU &
SRI. ALAN PAPALI.

RESPONDENTS: RESPONDENTS/COUNTER PETITIONERS AND STATE

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1. VAKKOM B.PURUSHOTHAMAN,BINDU,POTHUJANAM ROAD,KUMARAPURAM,MEDICAL COLLEGE P.O, THIRUVANANATHAPURAM.

2. BIJU PURUSHOTHAMAN,BINDU,POTHUJANAM ROAD, KUMARAPURAM,MEDICAL COLLEGE P.O, THIRUVANANATHAPURAM.

3. BINU PURUSHOTHAMAN,BINDU,POTHUNAJAM ROAD, KUMARAPURAM,MEDICAL COLLEGE P.O,TRIVANDRUM.

4. DR.RAJAGOPAL,S/O.KODOTH NARAYANAN NAIR, LEKSHMI,N.P.P.NAGAR,KADAKAMPALLI VILLAGE, THIRUVANANTHAPURAM.

5. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.M.RATNA SINGH (SR.) FOR R1
BY ADV. SRI.M.AJAY FOR R1 TO R4
BY PUBLIC PROSECUTOR SRI. P.K. SURESH FOR R5.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11/04/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

Crl.R.P. No.734 of 2007

Dated this the 11th day of April, 2007.

ORDER

Can the Enquiry Commissioner and Special Judge (hereafter referred to as 'the Special Judge'), on receipt of a complaint under Section 190 of the Code of Criminal Procedure ('the Code', for short), issue an order to the officers of Vigilance and Anti-Corruption Bureau ('VACB', for short) to conduct a "preliminary enquiry" or "vigilance enquiry" while forwarding a compliant under section 156(3) of the Code? Can such direction be issued, as per the provisions contained in the Code or the Vigilance Manual? Can such enquiry be ordered, following the dictum laid down by the Supreme Court in **P.Sirajuddin v. State of Madras** (AIR 1971 SC 520)? These are the main questions to be examined in this revision.

FACTS, BRIEFLY:

2. A complaint was filed by revision petitioner against respondents 1 to 4, under Section 190 of the Code, alleging offences under sections 7 and 13 of the Prevention of Corruption Act ('the P.C. Act', for short) and also under section 120-B of the Indian Penal Code (`IPC', for short) etc. As per the allegations in the complaint, first accused was holding

office as Finance Minister in the State Cabinet during the period from 15.11.2004 to 28.7.2005. The accused 2 and 3 are his children and 4th accused is his son-in-law. All the accused, allegedly, in furtherance of common intention, to amass wealth by corrupt and illegal methods conspired and acquired property worth lakhs of rupees in Thiruvananthapuram District.

3. It is also alleged that the first accused, by abusing his official position, devised a plan to obtain valuable property, measuring large extent of land for his near relatives. According to complainant, accused 2 and 4 did not have sufficient source of income to purchase so much of properties and hence there are reasons to believe, (which can be proved by materials) that first accused, who by sheer abuse of his position as Finance Minister, by corrupt and illegal means obtained huge sums of money and used that money for the benefit of accused nos.2 to 4. The entire source, according to complainant, is traceable only to first accused's corrupt practices.

4. According to complainant, while first accused is allegedly liable independently for offences under sections 7 and 13 of the P.C. Act, others are also liable for same offence, under section 120B of IPC. On knowing that a complaint is filed, accused-second respondent filed Crl.M.P.627/2006 before the court below praying that complaint should not be taken on file for various reasons. The lower court took a view that the court is not expected to hear the accused or consider the merit of his contentions at that particular stage of the case and the complaint was numbered.

COURT DIRECTED ENQUIRY BY VACB:

5. Learned Special Judge forwarded the complaint to the Director, Vigilance and Anti-Corruption Bureau ('VACB', for short), with a direction that a "vigilance enquiry" shall be conducted into allegations levelled against accused/counter-petitioners. The lower court also ordered that if materials are collected in the enquiry warranting further investigation, then a case shall be registered and FIR be forwarded to the Court. It was also held that if sufficient materials are not obtained in such enquiry requiring further investigation, a report shall be submitted before the court below. This was done, as per order dated 30.8.2006.

6. In pursuance of the direction issued by the court below, a detailed enquiry itself was conducted. Several persons were examined and various documents were perused by VACB. A report was filed by the Superintendent of Police, VACB, Special Cell stating that the allegations made in the complaint are not established in evidence. On getting the report and on considering various aspects, the court below found that no materials are available to proceed with the complaint and the offences alleged therein are not made out and therefore, the complaint was dismissed. (It was also observed that follow up action, as recommended by the VACB shall be taken by the Inspector General, Registration in respect of the document specified to be undervalued, expeditiously).

PETITIONER'S CONTENTIOINS:

7. Sri.Alan Pappali, learned counsel appearing for revision petitioner

strongly contended that the order under challenge is per se illegal and contrary to the provisions contained in the Code of Criminal Procedure ('the Code' for short). The court below dismissed the complaint mainly on the basis of the report filed by the Superintendent, VACB, according to which, respondents 2 to 4 were having sufficient source for purchasing properties and that the funds were not provided by first respondent and that no materials are available to suggest that first respondent had misused his position as a public servant to acquire property etc. Learned counsel for petitioner submitted that the court cannot dismiss the complaint on the basis of an enquiry report filed by VACB. It was also pointed out that the lower court found that the allegations in the complaint, prima facie, disclose offences alleged against the accused and hence it ought to have taken cognizance of offence under Section 190 of the Code. If the court decides not to take cognizance of the offences also, the only other alternative left to the court is to forward the complaint for investigation under section 156(3) of the Code and not to order an enquiry by VACB, it is argued.

8. But, neither of the two courses which are open to the court, as per the provisions of the Code were followed by the court. Instead, the court forwarded the complaint to the Director, VACB and directed him to conduct a 'preliminary enquiry'. According to petitioner, this is contrary to the provisions contained in the Code and hence, illegal. It was also argued that when a complaint is forwarded to the police and an information relating to a cognizable offence is received at the police station, the police shall register

an FIR, as per section 154 of the Code and proceed to investigate, as per the provisions of the Code. But no preliminary enquiry can be conducted by police, prior to registration of FIR, it is argued.

RESPONDENTS' CONTENTIONS:

9. Learned counsel appearing for 1st respondent, Sri.M.Retna Singh, vehemently argued that the procedure adopted by the court below is perfectly legal and in tune with the dictum laid down by the Supreme Court in P.Sirajuddin v. State of Madras (AIR 1971 SC 520) and also a decision of this Court, in Biju C.Valluvanadan v. State of Kerala (2004(3) KLT 296) which was rendered, following the ratio in **Sirajuddin's** case. The court below only acted in accordance with the principles enunciated in those decisions and hence, the impugned order does not warrant any interference.

10. It was strenuously argued that unless a "preliminary enquiry" is conducted by VACB, it is likely that any unscrupulous complainant can harass an honest public servant, by filing a cleverly-drafted complaint, constituting all the ingredients of the offences but that may be discouraged by the court, in the interest of justice and more particularly, in the light of the principles laid down by the Supreme Court in **Sirajuddin's** case. It was submitted that the prevalent practice of issuance of directions for a 'preliminary enquiry' by VACB prior to registration of FIR is quite safe and proper and it may be allowed by this court to continue.

DOES **'SIRAJUDDIN'S** SUPPORT THIS?

11. On hearing both sides, I find that the mooted issue centers around

the dictum laid down in **Sirajuddin's** case. Therefore, to resolve the issue, I must first understand as to what exactly is the dictum in **Sirajuddin's** case. In **Sirajuddin's** case, it was a complaint filed against a Chief Engineer which was addressed to the Chief Minister of the State and also another Minister, alleging various offences under the Prevention of Corruption Act. On receipt of the above complaint, the Chief Minister asked the Director, VACB, to make a confidential enquiry. Thereafter, the government received a note from the Director casting serious aspersions on the Chief Engineer's reputation and also disclosing a few instances of his lack of probity. The Chief Minister then, ordered the Secretary to immediately look into the matter and asked the Director, VACB to pursue the investigation further. Thereupon, a detailed enquiry was conducted by the VACB by examining several witnesses and also verifying records. A charge-sheet was also launched against the Chief Engineer, alleging offences under the P.C. Act etc.

12. The Chief Engineer/accused filed a petition for quashing the above proceedings of enquiry and also sought for discharging him, on the ground that the charge was frivolous. He also filed writ petition before the High Court to quash the order of the Special Judge. A revision petition was also filed by him against the order of the Special Judge. Before the High Court, it was argued that there was violent departure from the provisions of the Code, in the matter of investigation and hence, cognizance of offences by the court is illegal . The High Court held, partly in favour of accused and the order of the Special Judge was quashed and certain directions were also issued to the

Special Court.

13. The Supreme Court considered the correctness of the order passed by the High Court and also the rival contentions raised in the matter in detail and it was held in **Sirajuddin's** case, as follows:

> "In our view the procedure adopted against the appellant before the laying of the first information report, though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fairplay. No doubt when allegations about dishonesty of a person of the appellant's rank were brought to the notice of the **Chief Minister**, it was his duty to direct an enquiry into the matter. **The Chief Minister in our view pursued the right course**. .....If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner.. . . . . When the inquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report."(Emphasis supplied)

PRELIMINARY ENQUIRY APPROVED:

14. A reading of **Sirajuddin's** case reveals that in that case, a 'preliminary inquiry' was conducted by Vigilance and Anti-Corruption Department into the allegations made against a public servant regarding commission of offences under the P.C. Act, by examining large number of

witnesses and by perusing several documents. The Supreme Court observed that the procedure adopted in conducting a preliminary enquiry is not in terms, forbidden by law. Though certain adverse observations are made by the Supreme Court regarding the nature of the 'preliminary enquiry' conducted by VACB, the Supreme Court was of view that conduct of such enquiry was only proper.

BUT, ENQUIRY NOT ORDERED BY COURT:

15. But, the most crucial aspect to be noted here is that the 'preliminary enquiry' conducted in **Sirajuddin's** case, was not as per the order of the COURT but, it was ordered by the CHIEF MINISTER. Therefore, what the Supreme Court considered and approved in **Sirajuddin's** case is the legality and propriety of the procedure adopted by the CHIEF MINISTER in ordering 'preliminary enquiry' and not that of any order issued by the COURT for such enquiry. The Supreme Court found that the direction issued by the Chief Minister for 'preliminary enquiry' is legal because, such a procedure was consistent with the procedure to be followed in the State of Madras, as per the relevant Manual.

16. In cases where the Government receives complaints against a public servant about commission of offences under the P.C.Act, the Chief Minister of State of Madras had the power to issue such orders for enquiry and VACB was bound to conduct such enquiry. The Supreme Court found that Vigilance and Anti-Corruption Department was set up in the State of Madras, entrusting with the conduct of an enquiry for the purpose of finding out

whether there is prima facie evidence of guilt of the officer and whether criminal proceedings are to be resorted to in cases where complaints are received by the government, Chief Minister etc.

17. VACB and the Chief Minister were bound to follow the procedure in the Manual in that State, since it was intended for the protection of honest public servants and to prevent any unnecessary harassment being caused to such officers. It is in the above background that the Supreme Court observed that when allegations of acts of dishonesty are made against a public servant, there must be suitable preliminary enquiry into such allegations before ordinary law of the land takes its course and further enquiry is proceeded with, in terms of the code, by lodging first information report.

18. But the Supreme Court had no occasion to consider in **Sirajudin's** case whether a Special Judge is empowered by any of the provisions of the Code or under the Manual to order a "preliminary enquiry", or any other form of enquiry, on receipt of a complaint under Section 190 of the Code. There is nothing in **Sirajuddin's** case to show that the Special Judge can direct VACB to conduct a "preliminary enquiry", while forwarding a complaint under section 156(3) of the Code. It is relevant to note at this juncture what this court held, referring to **Sirajuddin's** case, in

Raghunathan v. State of Kerala (2001(3) KLT 444). Here is the extract:

> "so, the decision of the Supreme Court cannot be understood as one which lays down the proposition that in all cases preliminary enquiry has to be conducted by the

> Vigilance department before a crime is registered in that Department".

19. I am in full agreement with the above observation on a reading **Sirajuddin's** case. In my humble view, the decision of the Supreme Court in **Sirajuddin's** case cannot be understood to lay down the proposition that the Special Judge can direct an officer of the Vigilance Department to conduct a 'preliminary enquiry' while forwarding a complaint under Sectin 156(3) of the Code and before registration of the FIR. What is held in **Sirajuddin's** case is that the CHIEF MINISTER is empowered to order `preliminary enquiry' by VACB but, there is nothing therein to show that the Special Judge can direct VACB to conduct a 'preliminary', 'detailed', 'formal' or vigilance enquiry under the provisions of the Code or any other provision. Therefore, the order passed by the Special Judge in a complaint received by him under Section 190 of the Code to conduct 'vigilance enquiry' or 'preliminary enquiry' by VACB cannot be said to be in tune with the dictum laid down by the Supreme Court in **Sirajuddin's** case.

SPECIAL JUDGE TO FOLLOW THE CODE:

20. Every criminal court is bound to act in accordance with the provisions contained in the Code, while dealing with criminal cases, unless any Special Statute provides to the contrary. There is no Special Law which prohibits application of the Code to the proceedings before the Special Judge. No provision was pointed out by either side to show that the Special Judge can adopt any procedure other than what is laid down in the Code, while

dealing with complaints involving offences under the P.C. Act. Therefore, the Special Judge has to act only in accordance with the procedure laid down in the Code, on receipt of a complaint under section 190 of the Code.

OPTIONS UNDER THE CODE:

21. On a joint reading of sections 190, 156(3) and 202 of the Code, I find that five options are available to the Magistrate who is empowered under Section 190 of the Code or authorised to take cognizance of the offence in the complaint as the case may be. Those are: i) he may take cognizance of the offence by himself; ii) he may order an investigation by the police under section 156(3) of the Code; iii) he may enquire into the case himself under Section 202 for the purpose of deciding whether or not there is sufficient ground for proceeding; iv) he may direct under section 202 of the Code, an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not, there is sufficient ground for proceeding; [such order shall not be passed except in cases where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session or in cases where the complaint has not been made by a Court unless complainant and the witnesses present (if any) have been examined on oath under Section 200 of the Code], v) he may not take cognizance of the offence and drop the proceedings, if the complaint does not disclose any offence or if he is satisfied that it is frivolous or vexatious.

22. It is settled by now that the above provisions are applicable to the

proceedings before the Special Judge also. The Special Judge may, therefore, act in accordance with Sections 190, 156(3) or 202 etc. of the Code, while dealing with private complaints received under Section 190 of the Code. Referring to Section 190 of the Code, learned counsel for respondent submitted that the Special Judge is not bound to take cognizance of the offence, even if the facts alleged in the complaint disclose the commission of an offence. A three-judges bench of the Supreme Court held in **Devarapally Lakshminarayana Reddy v. V. Narayana Reddy, (1976) 3 SCC 252** as follows:

> "It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence. This is clear from the use of the words "may take cognizance" which in the context in which they occur cannot be equated with "must take cognizance". The word "may" gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself."

23. Thus, there is nothing illegal, if the Special Judge fails to take cognizance of the offence alleged in the complaint, on receipt of a complaint under Section 190 of the Code, even if the court finds that the allegations in the complaint constitute an offence. The expression used in Section 190 is "may" and hence, the Special Judge may or may not take cognizance of the offence by itself and he is not bound to take cognizance of the offence

under Section 190 of the Code. In cases where sanction under Section 197 (1) of the Code is a pre-requisite for taking cognizance of the offence, the court will be, in fact, prohibited from taking cognizance of the offence, in the absence of sanction.

24. As per Section 197(1) of the Code, when a public servant of the nature referred to therein is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence, except with the previous sanction of the relevant government. So, in cases to which section 197 applies, there is a bar for the court to take cognizance of offence, in the absence of requisite sanction. But, the bar under section 197(1) only prohibits the court from taking cognizance of offence, but it does not interdict the court from ordering investigation under Section 156(3) of the Code. Thus, in cases in which the Special Judge finds that the complaint discloses an offence under the P. C. Act and still, he does not propose to take cognizance of the offence, he will be empowered to adopt the second option and order an investigation under section 156(3) of the Code by the relevant officer of VACB.

POLICE / VACB SHALL REGISTER FIR:

25. The officers of VACB are 'police officers', and the office of Director and certain other offices of VACB are notified as `police stations'. Therefore, officer in charge of such office must follow the procedure laid down in the Code, on receipt of information relating to an offence and there is no reason

why he should depart from the procedure laid down in the Code. Section 154 of the Code provides that the police officer in charge of a police station shall enter substance of every information relating to the commission of a cognizable offence in a book to be kept by such officer in such form, as the State Government may prescribe in this behalf ie., the form of FIR. The expression used in section 154 is 'shall' and not 'may' and hence, it is mandatory for the police officer in charge of a police station to register the FIR, on receipt of information relating to commission of a cognizable offence.

26. It is held by the Supreme Court in various decisions that even if a court does not direct in so many words that an FIR should be registered, while ordering investigation under Section 156(3) of the Code, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because, only thereafter, he can take further steps contemplated in Chapter XII of the Code. It is held by the Supreme Court in *Mohd. Yousuf v. Afaq Jahan,(2006) 1 SCC 627* (vide also *Suresh Chand Jain v. State of M.P.,(2001) 2 SCC 628)* as follows:

> " Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

27. A Division Bench of this court also held in Satheesh v. Enquiry Commr. & Special Judge [2003 (3) KLT 480] and in Mohandas v. Enqiry Commr. & Special Judge [2004(1) KLT 873] as follows:

> "The police officer who is directed by the criminal court under S.156(3) to conduct investigation shall follow the procedure prescribed under S.154 of the Code so as to record the complaint as the first information report and then proceed to investigate the case. We find no other provision in the Code empowering the Special Court to forward Ext. P1 complaint together with the documents produced by the complainant to the Director of Vigilance and Anti-Corruption Bureau to conduct enquiry or investigation as the case may be".

28. Reliance was placed by learned counsel for petitioner on Raghunathan v. State of Kerala [2001 (3) KLT 444] wherein this court held that the Vigilance Cell is bound to register a crime on the basis of the complaint sent to it for investigation under S. 156(3) of the Code and the Vigilance Cell need not conduct a "preliminary enquiry" before registration of the FIR. The relevant extract from **Raghunathan's** case (which was rendered on a reference to the dictum laid down in **Sirajuddin's** case) is as follows:

> "But the Vigilance Cell is bound to register a crime on the basis of the complaint sent to it for investigation under S. 156(3) Cr. P.C. and hence the Vigilance Cell cannot be faulted for registering a crime without conducting a preliminary enquiry".

29. Therefore, from the above discussion, it follows that on receipt of a complaint under section 190 of the Code, even if the complaint discloses an offence under the P.C. Act, the Special Court may order investigation under

section 156(3) of the Code. But, on issuance of such order and on receipt of an information regarding commission of a cognizable offence, on the basis of the complaint forwarded to it by the Special Judge, the relevant officer of VACB is bound to register an FIR, as per section 154 of the Code. He will have no other option under law, than to register an FIR, if such complaint 'prima facie' discloses a cognizable offence, whether there is a specific order by the Special Judge to register an FIR or not.

30. It is clear from a reading of the order dated 30.8. 2006 of learned Special Judge that he entered a finding that the complaint prima facie discloses a cognizable offence and he forwarded the complaint to the Director, VACB for investigation under section 156(3) of the Code. But, while forwaridng the complaint to the Director, the Special Judge also ordered that a 'vigilance enquiry' be conducted by him and this has to be done prior to the registration of the FIR. Can such order for conduct of an enquiry be justified in law ? Will it be legal? This is my next probe.

ANY PROVISION FOR ENQUIRY?

31. On going through the Code, I could not come across with any provision therein which empowers the Special Judge or the Magistrate to order any 'enquiry' to be conducted by the officers of VACB/Police ,while exercising the powers under section 156(3) of the Code. The Special Judge has no power either under the Code or under any Special Statute or law to order a 'preliminary enquiry' or any type of enquiry to be conducted by any officer of VACB, while ordering investigation by invoking powers, under

section 156(3) of the Code. By passing an order for 'preliminary enquiry' or 'vigilance enquiry', prior to the registration of FIR, in cases where a cognizable offence is prima facie made out, the Special Judge virtually prevents the officer of VACB concerned, from registering FIR in accordance with Section 154 of the Code. The officer of the VACB is also forced to act in contravention of section 154 of the Code and conduct a 'preliminary enquiry' or such enquiry as ordered, without registering an FIR.

32. Therefore, in the absence of any specific provision in the Code empowering the Special Judge to issue any direction for enquiry, while acting under section 156(3) of the Code, no order shall be issued by the Special Judge to the officers of VACB, to conduct a 'preliminary enquiry' or 'vigilance enquiry', before registration of the Fir, especially in cases in which the complaint prima facie discloses a cognizable offence. Such order, if any, passed for conduct of a 'vigilance enquiry' or 'preliminary enquiry' by the VACB while exercising powers under section 156(3) of the Code is not a mere irregularity in the procedure adopted the Special Judge, but it is an order passed without jurisdiction, and it is clearly illegal. Such an order also prevents the officer of VACB from registering an FIR, based on the information contained in the complaint and thereby it offends section 154 of the Code. On this count also the order is illegal

VACB NOT BOUND TO REGISTER FIR?

33. Learned counsel for accused-respondents argued that following the dictum laid down in a decision of this court in *Biju C.Valluvanandan* v. *State*

of Kerala [2004(3) KLT 296], VACB can conduct a preliminary enquiry prior to registration of FIR and it is not bound to register FIR. It is laid down in the said decision that when a complaint against a public servant alleging the commission of the offences under the P.C. Act is forwarded by the Special Judge to Vigilance Officer, he is NOT bound to register a case immediately on receipt of the complaint. It was also held therein that a "preliminary enquiry" has to be conducted by the Vigilance Officer and only if such enquiry reveals *prima facie* offence of guilt of the public servant, he is bound to register a crime. Placing reliance upon the dictum laid down in **Sirajuddin's** case, is held in **Biju's** case as follows:

> "No doubt when a complaint is forwarded to the police by a Magistrate under S.156(3) of the Crl.P.C. for investigation, the police is bound to register a crime and investigate the case. But, when a complaint against a public servant alleging the commission of the offences under the Prevention of Corruption Act is forwarded to the Vigilance Officer, he is not bound to register a case immediately on receipt of the complaint. In *P.Sirajuddin v. State of Madras,* AIR 1971 SC 520, it was held by the Supreme Court that before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. In view of the decision referred to above, only if the preliminary enquiry reveals *prima facie* offence of guilt of the public servant, the Vigilance Officer is bound to register a crime. If on an enquiry, the allegations are found to be baseless, the Vigilance Officer is not bound to register a case. But, he must send a report to the Special Judge and on a consideration of the report, the Special Judge can drop the proceedings".

34. It is true that it is laid down in **Biju's** case referred above that a Vigilance Officer is not bound to register FIR on receipt of a complaint as forwarded by the Court. But he has to conduct a 'preliminary enquiry' before registering an FIR.

CONFLICT OF VIEWS?

35. But, it was pointed out by learned counsel for petitioner that the above view is diametrically opposite to an earlier view expressed by this Court in the decision reported in *Raghunathan* v. *State of Kerala* [2001 (3) KLT 444]. On going through the above two cases, there cannot be any dispute that there is an obvious conflict of views of this court on the same point. Hence, I am confronted with a more serious question now -- which of the above two decisions shall be followed by me in this case ?

36. Learned counsel for petitioner, citing various decisions of the Supreme Court in 2003(5) SCC 448, 2002 (1) SCC 1, 1997 (10) SCC 428 argued that the decision in Biju's case was rendered *per incuriam*, and hence, it is legally liable to be ignored. It is also contended that the dictum in **Sirajuddin's** case was wrongly understood by this court in **Biju's** case and it was misapplied therein and hence, it does not lay down the correct law.

37. At the very outset, I would make it very clear that I am not, for a moment, prepared to or inclined to embark upon any probe into the question whether either of the above decisions lays down the correct law or not. I am not supposed to do so. I cannot also make a choice of my own and accept or reject either one of them, to my liking. But, I am bound to consider the

serious contention raised whether the later decision in **Biju's** case is *per incuriam* of **Raghunathan's** case.

37. In **Raghunathan's** case, a learned judge of this court laid down the proposition that the Vigilance Cell IS BOUND to register a crime on the basis of the complaint sent to it by the Special Judge. This view is consistent with the decisions of the Supreme Court referred to by me in the earlier earlier paragraphs. It was also held in **Raghunathan's** case that the Vigilance Cell can register a crime without conducting any "preliminary enquiry". But, in a subsequent decision of this court, ie., in **Biju's** case, another learned judge of this court held that when a complaint against a public servant alleging the commission of the offences under the P.C. Act is forwarded by the Special Judge to Vigilance Officer, he is NOT BOUND to register a case immediately on receipt of the complaint. This view is contrary to the decisions of the Supreme Court, which lay down that it is the duty of the officer in charge of the police station to register the FIR on receipt of information relating to congnizable offence as disclosed in the complaint which is forwarded by the court to the police.

38. Though the dictum laid down by the Supreme Court in certain decisions is followed in **Raghunathan's** case, this case was not referred to in **Biju's** case, while deciding the same issue. It was held in **Biju's** case that a "preliminary enquiry" has to be conducted by the Vigilance Officer and only if such enquiry reveals *prima facie* offence of guilt of the public servant, he is bound to register a crime. Both the decisions were rendered by single

benches of this court and in both cases, the dictum in **Sirajuddin's** case was applied, but of course, to arrive at a diametrically opposite view. It appears that the later decision (**Biju's** case) was pronounced in ignorance of the earlier decision of the same court **(Raghunathan's** case) and no reference was also made of the earlier decision in the later decision, which is rendered on the same point.

39. It is held in ***Dawoodi Bohra Community v. State of Maharashtra [(2005) 2 SCC 673]*** as follows:

> *"Per incuriam* means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law"

40. In *A.R. Antulay* v. *R.S. Nayak* [(1988) 2 SCC 602] the Supreme Court held thus:

> *"Per incuriam"* are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong".

41. From the above discussion, it follows that a decision rendered by a court in ignorance of a previous binding decision of its own or of a court of co-ordinate jurisdiction is 'per incuriam' and is liable to be ignored under certain circumstances. Thus, in the light of the decision laid down by the Supreme Court and for the various reasons already discussed by me, with great respect, I hold that **Biju's** decision is 'per incuriam' of the earlier

decision of this Court and hence, I am constrained to follow the earlier decision rendered in **Raghunathan's** case.

42. It is also submitted by learned counsel for respondents that as per the legal position settled by the Supreme Court, FIR need not be registered under certain circumstances, even if an information is received regarding cognizance of cognizable offence. For example, if the information is vague, cryptic or anonymous. Therefore, there is nothing illegal or improper for the VACB in conducting a 'preliminary enquiry', prior to registration of the FIR, it is contended. Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283 can be looked into in this context**:**

> "It is evidently a cryptic information and is hardly sufficient for discerning the commission of any cognizable offence therefrom..... The officer in charge of a police station is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. It is open to the officer-in-charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation thereto".

43. It is true that the officer in charge of a police station need not register an FIR if the information is vague, cryptic etc. But, a private complaint filed in Court will not normally be cryptic, vague or anonymous. If it is cryptic, vague or anonymous, it will not normally be entertained by the court also. Hence the situation arising in private complaints filed before the Special Judge cannot be compared with the cryptic, vague or anonymous complaints which may be received by the police, otherwise than through

court. A private complaint received by the Special Judge under section 190 is ordinarily subjected to strict judicial scrutiny and no court normally acts upon any vague, cryptic or anonymous complaint which does not reveal any particulars of the offence and such a complaint will not normally be forwarded to police for investigation. Therefore, the dictum laid down in the decision cited above will not be applicable to the fact-situation which is under discussion.

VIGILANCE MANUAL PERMITS ENQUIRY?

44. Learned counsel for accused-respondent made another strenuous attempt to support the impugned order by advancing an argument that even if it is admitted for arguments' sake that the Special Judge cannot direct to conduct of a 'preliminary enquiry' as per the Code, such an enquiry can be conducted, as per the provisions contained in the Vigilance Manual. Therefore, the conduct of preliminary enquiry by VACB, as per the order passed by the lower court is only legal and there is absolutely no scope for any interference in the impugned order. This argument, however, is refuted by learned counsel for petitioner and it is submitted that the Manual cannot, in any manner, go against the provisions of the Code, which alone can guide the Special Court while proceeding with complaints filed under Section 190 of the Code.

45. In the light of the strong rival submissions made, I have gone through the provisions of Vigilance Manual meticulously. The Vigilance Manual contains a compilation of various circulars and orders issued by Government

from time to time. As per GO(P) No.18/97/ Vig. dt. 5.4.1997 and GO(P) No. 65/92/Vig.dt.12.5.1992, VACB can conduct "Vigilance Enquiries" into the matters referred to the Director for enquiry by the Government. It also provides that if VACB receives any complaints, it cannot suo moto conduct any 'Vigilance Enquiry', but those complaints are to be forwarded to the government for getting orders and the enquiry shall be conducted only as per the orders of the Government.

46. It is provided in Chapter VI in clause 32 (ii) that Government have empowered the Bureau to conduct only one type of formal enquiry ie., Vigilance Enquiry. As per G.O(P) No. 18/97/ Vig., dated 5.04.1997, it is provided that the existing practice of conducting 'preliminary enquiry' and 'detailed enquiry' will be dispensed with and there will be only one form of formal enquiry viz., "vigilance enquiry". Thus, even as per the Vigilance Manual, there can be no 'preliminary' or 'detailed enquiry' by VACB but, only a formal enquiry.

47. It is also clear from the Manual that the "Vigilance Enquiry" arises only in cases where GOVERNMENT issues orders to VACB to conduct such enquiry in respect of complaints received either by Government or by VACB which are forwarded by it to the Government. But, I could not find any provision, order or circular in the Vigilance Manual which provides that a "preliminary enquiry" can be conducted by VACB, in cases where complaints are forwarded to it by the COURT. Any way, the Vigilance Manual refers only

to a formal enquiry ie., "Vigilance Enquiry" which can be ordered by the GOVERNMENT and not by the COURT.

SPECIAL JUDGE SHALL BE CAUTIOUS:

48. Learned counsel appearing for respondents, however, submitted that if the court forwards all private complaints where allegations are made against a public servant about commission of offences under the provisions of the P.C. Act, it will result in great injustice to honest public servants. By a clever drafting of a complaint, any complainant who is determined to spoil the future prospects and reputation of an honest public servant or his department can achieve his goal by filing a private complaint. This will be against the principles laid down by the Supreme Court in **Sirajuddin's** case, it is contended.

49. It has also been pointed out by learned counsel for respondents that it is not uncommon that a person against whom an FIR is registered for offences under the P.C.Act will have to wait for years together, until the investigation is concluded and he will be forced to bear the brunt of a long-pending prosecution. Even the mere registration of a crime itself is sufficient to spoil his career and if an FIR is registered without a preliminary enquiry, it is likely that interest of an honest public servant will suffer and he cannot be compensated for the loss sustained thereby. Learned counsel for respondents also adverted my attention to the following observations of

the Supreme court in Sirajuddin's case:

> "Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can of taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable".

50. No doubt, the facts referred to by learned counsel for respondents are some of the most relevant facts which are to be borne in mind by the Special Judge, while dealing with complaints filed under section 190 of the Code. The Court must apply its mind to all the relevant factors and see that the image of an honest public servant or his Department is not unnecessarily tarnished, at the instance of any unscrupulous private complainants, whose intention may only be to malign their reputation and to achieve some evil goal, which may be best known to them alone. The court shall not be a mere tool at the hands of such complainants and submit itself to their evil tactics

and, even unknowingly or unintentionally aid them in any manner, to achieve what they undeservingly desire.

51. Even though, technically speaking, an order passed by the court to conduct an investigation by police under section 156(3) of the Code is only to find out whether there are sufficient materials to proceed against an officer or not, the very fact that a crime registered against a person may attach stigma to a person's reputation and it can lead to unpredictable consequences to him. True, a mere registration of crime may not authorise any person to presume the guilt of the accused and the court also presumes only his innocence, until it is rebutted. But, these are only theoretical presumptions, which may not wash off the stigma or the loss, which an accused may suffer, once an FIR is registered on the basis of a false complaint.

52. Therefore, a situation like this demands a more serious judicial scrutiny of all relevant materials and the Special Judge must be extremely careful while passing an order an investigation under section 156(3) of the Code. No doubt the Special Judge is faced with a very difficult task of weeding out the frivolous and vexatious complaints, that too, at the very early stage of the proceedings. To identify a false complaint at that stage is, indeed, a tough exercise, especially in cases in which the complaints are carefully drafted under legal advice.

53. But, I am confidant that a Special Judge will be able to distinguish the fake from the genuine. His judicial 'Solomonian' wisdom,

experience and acumen will guide him to distinguish between the right and the wrong. The fragrance of a naive complaint shall be well-perceived and he will make sure that a genuine public servant shall not suffer nor shall a genuine complaint be thrown out at the threshold. The victim of an offence under the P.C. Act is the general public and the society at large. By crucifying an honest public servant also, the more sinned will be the society.

54. The Special Judge shall, therefore, be extremely cautious in exercising his powers under section 156(3) of the Code and he must think twice, before he lifts his pen to pass an order for investigation. The Special Judge shall meticulously apply his mind to the entire facts and circumstances of the case and consider whether it is a fit case to send for investigation or not. Such orders shall be passed only in deserving cases and there shall not be any mechanical order for investigation. The court shall not act as a mere post office and send every private complaint for investigation under section 156(3) of the Code.

55. A special Judge must also remember that the findings which he may enter into, while ordering investigation under Section 156(3) of the Code that there is a 'prima facie' case etc., by merely looking into a well-drafted complaint under legal assistance , will go a long way against the interest of an honest public servant. Such findings and observations are likely to affect the very process of a fair investigation adversely. The Special Judge shall, therefore, avoid making any observation or finding which may peril a fair investigation, while passing an order under section 156(3) of the Code.

ENQUIRY BY COURT IS SAFER:

56. On considering the various facts and circumstances, I find that *in cases to which Section 202 of the Code applies,* the best and the safest course open to the Special Judge will be, to conduct an enquiry by himself under the said Section rather than mechanically passing an order for investigation under section 156(3) of the Code. Section 202 of the Code provides that any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance (or which has been made over to him under section 192) may, if he thinks fit, enquire into the case himself, for the purpose of deciding whether or not, there is sufficient ground for proceeding.

57. It is also relevant to note that Section 202 of the Code empowers the Magistrate/the Special Judge to direct an investigation to be made by Police/VACB or by such other person as he thinks fit, for the purpose of deciding whether or not, there is sufficient ground for proceeding (such order shall not, however, be issued except in cases where the complaint relates to offence exclusively triable by Sessions Court or in cases where the complaint has not been made by a court, unless the complaint and witnesses (if any) have not been examined on oath under Section 200 of the Code). In such investigation also, evidence and other relevant materials can be collected and on the basis of such materials, the Special Judge can take an appropriate decision, as to whether the court has to further proceed with the case or not.

58. If the Special Judge adopts the course available in Section 202 of the Code, there will be the real effect of a 'preliminary enquiry' and it can

certainly protect the interest of both sides viz., the accused as well as the complainant. Thus, while striking a balance between the hardship that may be caused to a public servant or the society, (which is the real victim of the offence under the P.C. Act), in my considered opinion, the best option for the Special Judge will be to conduct of an enquiry by himself or order an investigation under Section 202 of the Code, in cases to which the said provision applies.

ON FACTS --CONCLUSION:

59. Now, coming to the facts of this case, I find that learned Special Judge committed an illegality by ordering a 'vigilance' or 'preliminary' enquiry by the Director, VACB prior to registration of an FIR, while invoking powers under section 156(3) of the Code. The court below also committed an error in making a detailed discussion and entering into certain findings that the allegations in the compliant prima facie constitute offence etc., while sending the complaint for enquiry and investigation which may be required under section 156(3), because such findings are likely to impair a fair and impartial investigation. Learned Special Judge also failed to consider or apply his mind to the question whether there is any legal bar for taking cognizance of the offence by himself, under section 190 of the Code on any ground. He also does not appear to have looked into whether Section 202 of the Code applies to the facts of the case and if it is a fit case to proceed under the said provision to make an enquiry by himself or direct an investigation thereunder. In the above circumstances, the impugned order and the order

dated 30.8.2006 of learned Special Judge directing to conduct vigilance enquiry are liable to be set aside. The entire matter requires a fresh consideration by the Special Judge, in accordance with law.

60. Learned counsel for respondents submitted that an opportunity of hearing may be given to respondents before the court below, to avoid any probable error being repeated by the lower court in the procedure to be adopted, while dealing with complaint, afresh. It is also submitted that the first respondent already suffered enough and if such an opportunity is denied, irreparable harm will be caused to him, since he will be forced to face multiplicity of proceedings.

61. On the peculiar facts and circumstances of this case, I find that the above request has to be accepted, in the interest of both sides and to avoid multiplicity of proceedings. Learned counsel for petitioner also fairly conceded that the respondents can be granted an opportunity of hearing to a limited extent of addressing the court only on the procedure to be adopted in the case. I am satisfied that the respondents must be granted an opportunity to address the lower court on the limited question relating to to the procedure to be adopted by the court below, while dealing with the complaint which is received under Section 190 of the Code.

In the result, the impugned order and the order dated 30.8.2006 are set aside and the case is remanded to the court below for fresh consideration and disposal in accordance with law. Learned Special Judge

shall afford a reasonable opportunity of hearing to the respondents, in the light of the observations made in this order.

This petition is allowed.

Sd/-

K. HEMA, JUDGE.

krs.

K. HEMA, J.

Crl.R.P. No.734 of 2007

11th day of April, 2007.

ORDER